

ELEANOR GRIFFIE
Claimant

WATSON SERVICES
Respondent

LIBERTY MUTUAL INSURANCE CO.
Insurance Carrier

¹ The preliminary hearing Order did not address claimant's request for neck treatment, only specifically denying claimant's request for left shoulder treatment.

Claimant requests the Order be reversed, asserting her left shoulder injury is the direct and natural result of her right shoulder injury and subsequent overuse.² Respondent requests the Order be affirmed based on K.S.A. 2012 Supp. 44-508(f)(2).

The issue for the Board's review is: Is claimant's left shoulder injury compensable?

FINDINGS OF FACT

Claimant worked for respondent as a food service worker. On January 27, 2013, while lifting a pan weighing over 30 pounds out of the oven, she felt a "crack" in her right shoulder and experienced immediate pain. She testified both shoulders hurt, but the right was worse, so she focused on her right shoulder pain.

John Osland, M.D., an orthopedic surgeon, performed right shoulder surgery on February 20, 2013. Following surgery, claimant began complaining of neck and left shoulder pain. While claimant testified both shoulders hurt at the time of the accident, she also testified that her left shoulder and neck started hurting in March or April, after her surgery, when she was unable to use her right hand.³

Claimant's April 9, 2013 Application for Hearing alleged a January 27, 2013 injury involving her right shoulder, neck, left shoulder and all body parts affected thereby due to lifting a roast from an oven and overuse while performing normal job duties.

Pedro A. Murati, M.D., who is board certified in electrodiagnostic medicine and physical medicine and rehabilitation, evaluated claimant at her attorney's request on May 22, 2013. At that time, among other diagnoses, Dr. Murati indicated claimant had a left shoulder sprain secondary to overuse.⁴

A preliminary hearing was held June 18, 2013. The judge issued an order authorizing John D. Osland, M.D., to treat claimant's left shoulder and neck, if related to the work injury. On June 28, 2013, Dr. Osland indicated claimant's right shoulder was improving and noted "[h]er left shoulder was not hurt at the time but now it has been causing some soreness with it. Again, there is no one injury that she has had to her left shoulder."⁵ Dr. Osland diagnosed claimant with left shoulder impingement syndrome and recommended an MRI of her left shoulder. Dr. Osland stated:

² Claimant did not assert the judge erred in not addressing her request for neck treatment.

³ P.H. Trans. at 7-8.

⁴ *Id.*, Cl. Ex. 1 at 1. Dr. Murati's May 22, 2013 report was not placed into evidence. Rather, Dr. Murati referenced his earlier conclusions in his August 29, 2013 report, which was Cl. Ex. 1.

⁵ *Id.*, Resp. Ex. 1 at 5.

She does have a type 2 acromion which means she has a little bit of an extra curve to the acromion than the average person and makes her a little more prone to impingement. That is not a work related problem. That is just a genetic problem.⁶

Dr. Osland also noted, "There are studies out there that show people in her age group will have a full thickness tear and be asymptomatic and so she may have a full thickness tear and still not be related to her work."⁷ Dr. Osland noted the need to evaluate claimant's left shoulder due to the fact she had a right rotator cuff tear.

Dr. Osland referred claimant to David Hufford, M.D., for her neck complaints.⁸ At their initial July 3, 2013 appointment, Dr. Hufford recorded claimant's concern that her left shoulder hurt due to "over-reliance on the left arm while in rehabilitation for the right shoulder operation."⁹ Claimant testified Dr. Hufford told her there was no use treating her neck because the neck problems were coming from her shoulders. Dr. Hufford, in his report, suggested physical therapy for claimant's neck following right shoulder injury and rotator cuff repair.

Claimant had a left shoulder MRI on July 9, 2013. The MRI report is not in evidence.

Claimant returned to Dr. Osland on July 25, 2013. Dr. Osland recommended claimant have surgery for a full thickness left rotator cuff tear. His report stated, in part:

A 51-year-old female here for MRI study of her left shoulder. Again she's not had any one injury to the shoulder. She has weakness and pain. We've ordered the MRI arthrogram and it does show that she has a full thickness tear to the supraspinatus and part of the infraspinatus tendons of the rotator cuff tendons. I'm not sure how she got this tear. She probably has genetically weak rotator cuff tendons. And she is more susceptible to tearing them. Wh[en] I first saw her she did not comment on having pain in [her] left shoulder. And it is possible this could be related to overuse since she's been recovering from the right shoulder. [A] normally healthy rotator cuff tendon can take the type of activity she's been doing without any problem. This again leaves me to believe that she has genetically weak rotator cuff tendons.¹⁰

⁶ *Id.*, Resp. Ex. 1 at 5.

⁷ *Id.*, Resp. Ex. 1 at 6.

⁸ *Id.*, Cl. Ex. 2 at 1. Claimant testified the insurance company referred her to Dr. Hufford. P.H. Trans. at 7.

⁹ *Id.*, Cl. Ex. 2 at 1.

¹⁰ *Id.*, Resp. Ex. 1 at 2.

The insurance carrier sent a July 29, 2013 letter to Dr. Osland, inquiring whether claimant's right shoulder injury was the prevailing factor in causing her left shoulder problems and need for surgery. Dr. Osland responded: "No, genetically weak rotator cuff tendon appears to be the prevailing factor."¹¹

On August 29, 2013, claimant was again seen at her attorney's request by Dr. Murati. Claimant complained of left shoulder pain radiating into her neck and upper back. Dr. Murati noted left shoulder impingement. Claimant's left shoulder range of motion as 150° flexion, 150° abduction and 60° internal rotation. Dr. Murati diagnosed claimant with a left rotator cuff tear and myofascial pain syndrome of the left shoulder girdle extending into the cervical and thoracic paraspinals.

Dr. Murati recommended injections, medication and an evaluation by an orthopedic surgeon. Dr. Murati opined claimant's diagnoses were the direct result of her January 27, 2013 work-related injury. In addressing prevailing factor, Dr. Murati stated:

The claimant sustained an accident and multiple repetitive traumas at work which resulted in bilateral upper extremity, neck, and upper back pain. She is a young person. She is a nonsmoker. Her hobbies are not known as a direct cause for her current diagnoses. She does admit to having pre-existing right shoulder pain. However, she states that it resolved after having a cortisone injection and she was in her usual and general state of health prior to this work related injury. She has significant clinical findings that have given her diagnoses consistent with her described accident and multiple repetitive traumas at work. Therefore, it is under all reasonable medical certainty and probability that the prevailing factor in the development of her conditions is the accident and multiple repetitive traumas at work.¹²

A preliminary hearing was held September 26, 2013. Claimant was still treating with Dr. Osland for her right shoulder. She testified she cannot really use her right hand and experiences increased pain when using her left hand.

Following the preliminary hearing, the court designated Paul Stein, M.D., a board certified neurosurgeon, to perform an independent medical examination to determine whether "the Claimant's left shoulder problems are a result of the right shoulder injury."¹³

Claimant was evaluated by Dr. Stein on November 7, 2013. Dr. Stein's examination revealed some swelling over the left trapezius and rhomboid musculature. Dr. Stein reported claimant's left shoulder range of motion was restricted to 90° flexion, 30° extension, 65° abduction, 50° internal rotation and 75° external rotation.

¹¹ *Id.*, Resp. Ex. 1 at 1.

¹² *Id.*, Cl. Ex. 1 at 4.

¹³ ALJ Order (dated Sep. 26, 2013).

Dr. Stein's report stated:

It is unlikely that the left shoulder rotator cuff tear was caused specifically by the non-work activity in the left upper extremity subsequent to the right shoulder injury. It is, however, more likely [than] not that the preexisting rotator cuff tear was aggravated and made symptomatic by that activity. Therefore, the left shoulder symptoms are a result of the right shoulder injury as a secondary effect.¹⁴

After the court's receipt of Dr. Stein's report, preliminary benefits were denied. The preliminary hearing Order quoted the above language from Dr. Stein's report and stated:

K.S.A. 44-508(f)(2) states:

"An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic."

The Court has reviewed the board decision of *Scott Finton v. Peninsula Gaming Partners*, 1,064,118, and finds the matter of *Hurtado v. I & A Painting & Remodeling*, 1,058,894, cited in *Finton* to be more on point.

The Claimant's request for treatment of her left shoulder is denied.

While evidence regarding prevailing factor was presented, the preliminary hearing Order did not discuss prevailing factor and neither party briefed the potential issue.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b provides, in part:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

¹⁴ Stein Report (dated Nov. 7, 2013) at 5.

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹⁵

The phrases arising "out of" and "in the course of" employment are conjunctive; each condition must exist for compensability. They have separate and distinct meanings:

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.¹⁶

K.S.A. 2012 Supp. 44-508 states, in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

¹⁵ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

¹⁶ *Id.*

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

Every direct and natural consequence that flows from a primary compensable injury, including a new and distinct injury, is compensable.¹⁷ Casco states:

In workers compensation litigation, when there is uncontroverted expert medical testimony linking the causation of the second injury to the primary injury, the second injury is considered to be compensable as the natural and probable consequence of the primary injury.¹⁸

¹⁷ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972); see also *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶ 2, 128 P.3d 430 (2006).

¹⁸ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 4, 154 P.3d 494 (2007).

ANALYSIS

The new law that went into effect on May 15, 2011 law addresses compensability of an “injury.” Claimant’s left shoulder condition is such an injury. Where there is an injury, the prevailing factor in causing such injury must be either an accident or repetitive trauma. The new law excludes from compensability sole aggravations, accelerations or exacerbations of preexisting conditions and situations where a preexisting condition is rendered symptomatic. The new law excludes from compensability, among other things, accidents or injuries due to personal risks or idiopathic causes.

The court-ordered physician, Dr. Stein, did not address prevailing factor. According to Dr. Stein, claimant had a preexisting left rotator cuff condition that was likely not specifically caused by claimant’s non-work use of her left arm, but was aggravated and made symptomatic from claimant’s use of her left upper extremity, basically as a secondary result of the right shoulder injury.

Dr. Osland did not specifically know how claimant’s left rotator cuff was torn, but opined the prevailing factor in the development of claimant’s left shoulder injury was her genetically weak rotator cuff tendons. He noted claimant had an extra curve in her acromion, which increased the risk of impingement. The extra curve was a genetic condition, not a work-related condition. Dr. Osland opined claimant’s overuse of her left shoulder while recovering from her right shoulder injury was only a possible cause of her injury.

Dr. Murati initially opined, following a May 22, 2013 evaluation, that claimant’s left shoulder sprain was secondary to overuse. Dr. Murati’s August 29, 2013 report indicated all of claimant’s diagnoses, including her left shoulder injury, were the direct result of her January 27, 2013 accidental injury, but also that the prevailing factor in claimant’s conditions was “the accident and multiple repetitive traumas at work.”¹⁹ The evidence does not support a finding claimant sustained a left shoulder injury due to work-related repetitive trauma. Claimant only testified to a specific accidental injury. Therefore, Dr. Murati’s causation opinion is diluted because he at least partially attributed claimant’s left shoulder injury to repetitive work.

This Board Member concludes claimant’s use of her left upper extremity resulted in an aggravation of a preexisting condition, namely the curvature of her left acromion and genetically weak left rotator cuff tendon. As such, Judge Clark’s denial of benefits is affirmed. This Board Member is not addressing the new law’s prevailing factor requirement.

¹⁹ P.H. Trans., Cl. Ex. 1 at 4.

As an aside, the judge's preliminary hearing Order referenced *Hurtado*²⁰ and *Finton*,²¹ two prior Board decisions from preliminary hearing appeals. The judge indicated the facts of the present claim were more akin to *Hurtado* than *Finton*. *Hurtado* involved a denial of benefits in which Mr. Hurtado fell off a ladder because of his preexisting seizure disorder, a personal risk. *Finton* involved a claimant who fainted and struck his head after seeing his own blood following a work-related cut. Respondent argued claimant had a propensity to faint upon seeing his own blood, and his fainting represented a non-compensable personal risk. This Board Member concluded Mr. Finton's head injury was the direct and natural result of seeing his cut thumb, not due to his propensity to react to the sight of his own blood by fainting.

Claimant proposes *Finton* means "secondary injuries resulting from compensable work injuries do not have to prove that the initial work injury is the 'prevailing factor' in causing the secondary injury."²² Claimant argues that once she "establishes a work injury where the work accident is the prevailing factor in causing the initial injury, all resulting and subsequent injuries are also covered by the Kansas Workers Compensation Act."²³ This Board Member did not reach such conclusion in *Finton*. Rather, this Board Member noted the new law did not abrogate the direct and natural result rule as established by case law.

While this Board Member concluded in *Finton* that such claimant's head injury was the direct and natural result of his compensable thumb laceration, *Finton* does not stand for the proposition that new law requirements do not apply to secondary injuries. The medical evidence in *Finton* established the prevailing factor in Mr. Finton's injuries was his accidental injury. *Finton*, in fact, analyzed whether certain new law defenses, such as K.S.A. 2012 Supp. 44-508(f)(3)(A)(iii & iv), might have barred compensability of Mr. Finton's head injury. Obviously, there would be no need to analyze such new law defenses if the new law did not apply to secondary injuries.

Interpreting *Finton* to exclude application of the new law to secondary injuries is incorrect. As in *Finton*, the Board has consistently applied new law compensability requirements, such as prevailing factor, to injuries that are alleged to be directly traceable or the direct and natural result of primary injuries:

²⁰ *Hurtado v. I & A Painting and Remodeling*, No. 1,058,894, 2013 WL 3368487 (Kan. WCAB June 13, 2013).

²¹ *Finton v. Peninsula Gaming Partners*, No. 1,064,118, 2013 WL 4779986 (Kan. WCAB Aug. 22, 2013).

²² Claimant's Brief at 3.

²³ Claimant's Brief at 4.

- *Jordan-Cain*²⁴ (prevailing factor standard applied to psychological condition alleged to be directly traceable to physical injury);
- *Taylor*²⁵ (claimant's left knee accident was the prevailing factor in his development of right knee and low back conditions);
- *Moody*²⁶ (in assessing a psychological injury claim, this Board Member applied both the requirement from *Love*,²⁷ that to be compensable, a traumatic neurosis must be directly traceable to a physical injury, as well as the new law's prevailing factor standard);
- *Heyen*²⁸ (a Board Member stated claimant would need to prove her psychological injury was directly traceable to her physical injury and show her accident was prevailing factor in causing her psychological injury); and
- *Robinson*²⁹ (claimant's bilateral lower extremity accident was the prevailing factor in causing her low back injury, which was also the natural and probable consequence of the original injuries).

CONCLUSIONS

Dr. Stein opined claimant's preexisting left shoulder condition was aggravated and rendered symptomatic on account of her right shoulder injury. As concluded by Judge Clark, K.S.A. 2012 Supp. 44-508(f)(2) renders such injury not compensable.

DECISION

WHEREFORE, the undersigned Board Member affirms the December 16, 2013 preliminary hearing Order.³⁰

²⁴ *Jordan-Cain v. State of Kansas*, No. 1,058,565, 2012 WL 3279504 (Kan. WCAB July 12, 2012).

²⁵ *Taylor v. American Builders & Co.*, No. 1,063,065, 2013 WL 2455716 (Kan. WCAB May 15, 2013).

²⁶ *Moody v. KBW Oil & Gas Co.*, No. 1,061,663, 2013 WL 4051831 (Kan. WCAB Bd. July 23, 2013) & *Moody v. KBW Oil & Gas Co.*, No. 1,061,663, 2013 WL 6382913 (Kan. WCAB Nov. 18, 2013).

²⁷ *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, rev. denied 245 Kan. 784 (1989).

²⁸ *Heyen v. City of Wichita*, No. 1,064,079, 2013 WL 2455722 (Kan. WCAB May 29, 2013).

²⁹ *Robinson v. State of Kansas*, No. 1,064,005, 2013 WL 6382915 (Kan. WCAB Nov. 25, 2013).

³⁰ By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

IT IS SO ORDERED.

Dated this _____ day of February, 2014.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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